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December 9, 2021

Via Federal eRulemaking Portal

Secretary Martin J. Walsh
United States Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Director Tina Williams
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

RE: Comment Supporting Notice of Proposed Rulemaking, *Proposal To Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 86 Fed. Reg. 62,115 (Nov. 9, 2021) RIN 1250-AA09.

Dear Secretary Walsh and Director Williams:

The undersigned Attorneys General of New York, Pennsylvania, California, Colorado, Connecticut, the District of Columbia, Illinois, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, and Vermont (collectively, "States") write in strong support of the proposed rulemaking by the U.S. Department of Labor ("DOL" or "Department") to rescind the 2020 Office of Federal Contract Compliance Programs ("OFCCP") religious exemption rule ("2020 Rule"). *See Proposal To Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 86 Fed. Reg. 62,115 (Nov. 9, 2021). We thank the agency for this opportunity to comment.

As you know, the States have challenged the 2020 Rule in the Southern District of New York, asserting that the Rule violates the Administrative Procedure Act. *See New York v. U.S. Dep't of Labor*, No. 21-cv-536 (S.D.N.Y. filed Jan. 21, 2021). The lawsuit, which is currently stayed, alleges that the 2020 Rule conflicts with Title VII and the terms of Executive Order 11,246, fails to justify its departure from settled interpretations of E.O. 11,246, and is inadequately explained. The Rule did not adequately consider or quantify the 2020 Rule's

widespread harms, and its rescission will benefit workers, employers, and the States with no costly disruptions.

I. The vast expansion of the religious exemption departed from the purposes of E.O. 11,246, from the text of Title VII and its caselaw, and from longstanding OFCCP policy and practice.

One year after enactment of the Civil Rights Act of 1964, President Lyndon Johnson issued Executive Order 11,246 (“E.O. 11,246” or “Order”).¹ In fact, executive action prohibiting discrimination dates back to President Franklin Roosevelt’s Executive Order 8802 of 1941. For the first time, however, E.O. 11,246 directed the Secretary of Labor, rather than presidential committees, to ensure equal opportunity in employment with federal contractors for members of protected classes. Originally, E.O. 11,246 prohibited discrimination and required affirmative action to ensure equal opportunity on the basis of race, color, religion, and national origin. Since then, the Order’s directive has been expanded to cover discrimination on the basis of sex, sexual orientation, and gender identity as well. It protects more than one-fifth of United States workers.

In 2002, President George W. Bush amended E.O. 11,246 to expressly import the narrow religious exemption contained in Title VII of the Civil Rights Act of 1964. Specifically, the exemption provides that the provisions of the Order:

shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

E.O. 11,246 § 204(c). In all, federal contractors have been prohibited from discriminating against members of protected classes and required to undertake certain affirmative obligations to ensure equal opportunity for nearly sixty years.

The 2020 Rule vastly expands the religious exemption, contravening the text and purposes of E.O. 11,246 and Title VII, and it narrows the anti-discrimination protections that the Executive Order and Title VII provide. In addition, it departs from nearly twenty years of OFCCP policy and practice. The 2020 Rule thus exceeds the agency’s authority and lacks a basis in statute or precedent. For these reasons and those discussed below, the States wholeheartedly support the proposed rescission of the 2020 Rule.

A. The 2020 Rule’s definitions violate Title VII and EO 11,246.

The 2020 Rule creates new definitions for “religion,” “particular religion,” “sincere,” and “religious corporation, association, educational institution, or society,” which are broader than the scope of Title VII’s exemption and the text of E.O. 11,246. Accordingly, the definitions

¹ U.S. Department of Labor, Office of Federal Contract Compliance Programs, History of Executive Order 11246, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (accessed Nov. 30, 2021).

should be rescinded. The 2020 Rule’s definitions include:

- *Religion* includes all aspects of religious observance and practice, as well as belief.²
- *Particular religion* means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.³
- *Sincere* means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party’s religious exercise or belief.⁴

The definition of “religion” departs from the statute by eliminating the final clause of the Title VII definition, providing “unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). The definition of “particular religion” likewise departs from Title VII, expanding the exemption from a preference for co-religionists to the ability to discriminate against the conduct of co-religionists. The definition transforms the exemption from the opportunity for a religious employer to prefer employees of the same faith to permission for an employer to impose its religious tenets on employees of different faiths. Finally, the definition of “sincere” is confusingly circular and, as interpreted by OFCCP in the 2020 Rule, does not require “uniformity” in the employer’s purported religious beliefs.⁵

Building on each other, the definitions together form an unlawful and overbroad test inconsistent with Title VII, E.O. 11,246, and any court’s interpretation of them. Accordingly, the States support OFCCP’s proposal to rescind the new definitions.

In addition, the 2020 Rule’s test for whether an entity qualifies as a religious corporation, association, educational institution, or society is contrary to Title VII, departs from the purposes of E.O. 11,246, and does not comport with any court’s interpretation of the religious exemption. The 2020 Rule provides a four-factor test for determining whether an employer is entitled to the exemption. A qualifying entity:

- (i) Is organized for a religious purpose;

² 85 Fed. Reg. 79,371.

³ *Id.*

⁴ *Id.* at 79,372.

⁵ *Id.* at 79,357.

- (ii) Holds itself out to the public as carrying out a religious purpose;
- (iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and
- (iv) (A) Operates on a not-for-profit basis; or (B) Presents other strong evidence that its purpose is substantially religious.⁶

It further provides that “[w]hether an organization’s engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization’s own sincere understanding of its religious tenets.”⁷ Finally, “[t]o qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.”⁸

The term “religious corporation, association, educational institution, or society” is lifted from Title VII, but the 2020 Rule’s test has not been adopted by any court interpreting the term. *See* 42 U.S.C. § 2000e-1(a). While the test purports to “follow” Judge O’Scannlain’s concurrence in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), OFCCP now recognizes that it “departs even from” that opinion, which included the prerequisite that the entity claiming a religious exemption be a nonprofit.⁹ In codifying this brand-new exemption for for-profit entities, the 2020 Rule also ignores that the Supreme Court has indicated that Title VII’s exemption does not extend to for-profit corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 716-17 (2014).

By and large, the Supreme Court decisions on which the 2020 Rule purports to rely simply affirm that neutral rules can be properly crafted to accommodate sincerely-held religious beliefs. The 2020 Rule improperly transforms the exemption for employers established primarily for a religious purpose to prefer co-religionist employees into a license for employers to discriminate against employees of any religion. Far from “adapt[ing] Title VII principles to ensure a proper fit in the government’s contracting context,” the 2020 Rule turns the religious exemption’s purpose on its head.¹⁰ The 2020 Rule’s incorrect interpretations of Supreme Court precedent do not enlarge OFCCP’s authority, nor allow it to contravene Title VII or E.O. 11,246.

B. The 2020 Rule fails to justify its break with longstanding interpretations of EO 11,246 and OFCCP policy and practice.

The protections of E.O. 11,246 have co-existed with the limited exemption for non-profit religious organizations to prefer co-religionists for nearly twenty years. Consistently, and as

⁶ *Id.* at 79,371.

⁷ *Id.*

⁸ *Id.*

⁹ 86 Fed. Reg. 62,118 n.4.

¹⁰ 85 Fed. Reg. 79,326.

recently as 2015, OFCCP has interpreted the exemption as a straight-forward accommodation to allow religious entities to have a preference for employees of the same religion.¹¹ DOL disputed that the 2020 Rule was promulgated “for the purpose of qualifying more organizations for the exemption” and stressed that it “will have no effect on the vast majority of contractors or the agency’s regulation of them, since they do not and would not claim the religious exemption.”¹² But it simultaneously offered that the 2020 Rule would “expand the pool of federal contractors” as justification for its departure from nearly twenty years of precedent and practice.¹³

Moreover, the Department asserted in the 2020 Rule that a larger pool of potential contractors will benefit the government, but failed to even attempt to estimate the impact the broader test will have.¹⁴ In addition to its inability to “perfectly ascertain how many religious organizations are government contractors, or would like to become such, and how those numbers would compare to the whole of the contracting pool,”¹⁵ DOL did not identify *a single* organization that previously would not have applied for a federal contract but would apply in light of the 2020 Rule. Nor did DOL present evidence that religious organizations avoided applying for contracts before the Rule, basing its assertions that they may have been “reluctant to participate as federal contractors” on three unidentified commenters, who are not themselves organizations that have been reluctant.¹⁶

Finally, DOL’s purported justification that the 2020 Rule will provide clarity for current contractors is unsound. The 2020 Rule institutes new, broader definitions and promulgates a test for religious organizations that no court or agency has applied. It also relies on undefined terms, such as “material amount of religious activity,” and “reasonably clear.”¹⁷ And the 2020 Rule admits that the application of the exemption is “necessarily and rightly nuanced and fact-dependent,” further belying its purported clarity.¹⁸ Nor does the 2020 Rule consider the reliance interests of employees at organizations that will newly claim the exemption, who count on the protections of E.O. 11,246 to shield them from their employer imposing its religious tenets in the workplace.

¹¹ See, e.g., OFCCP, Compliance Webinar (Mar. 25, 2015), https://www.dol.gov/ofccp/LGBT/FTS_TranscriptEO13672_PublicWebinar_ES_QA_508c.pdf.

¹² 85 Fed. Reg. at 79,332-33; 79,329.

¹³ See e.g., *id.* at 79,369.

¹⁴ *Id.* at 79,330.

¹⁵ *Id.* at 79,239.

¹⁶ *Id.* at 79,370.

¹⁷ *Id.* at 79,336-37.

¹⁸ *Id.* at 79,358.

II. Rescinding the 2020 Rule will prevent harms to our States’ workers, employers, taxpayers, and economies, and eliminate the confusion and burdens caused by the 2020 Rule’s conflict with our States’ laws.

The 2020 Rule poses various harms to our States’ workers, employers, taxpayers, and economic interests, conflicts with our States’ anti-discrimination laws, and presents burdens to our State agencies.

A. The 2020 Rule poses harm to the health and well-being of our States’ workers.

The 2020 Rule weakens anti-discrimination protections for workers employed by a federal contractor, which includes more than approximately twenty percent of private-sector workers nationwide.¹⁹ Indeed, during fiscal year 2021 alone, the total number of contracts performed in our States’ respective jurisdictions was nearly 3 million, totaling over 215 billion dollars.²⁰

While Title VII and similar state and local laws have improved employment outcomes for racial and ethnic minorities and reduced sex-and gender-based wage gaps and occupational segregation, discrimination persists in the American workplace based on race, ethnicity, gender, sex, gender-identity, religion, and other protected categories. For example, a 2018 survey found that lesbian, gay, and bisexual people are significantly more likely to report experiences of employment discrimination as opposed to their heterosexual peers, with 60% reporting being fired from or denied a job and 48% being denied a promotion or receiving a negative evaluation, compared to 40% and 32% respectively among heterosexuals.²¹ Further, according to a 2017 survey, “one in five LGBTQ people report[ed] being personally discriminated against because of their sexuality or gender identity when applying for jobs” and 22% said they had experienced such discrimination in pay or promotion.²² A 2016 nationally representative survey found “25.2 percent of LGBT respondents ha[d] experienced discrimination because of their sexual orientation or gender identity in the past year.”²³ And according to a 2017 Pew Research Center

¹⁹ See *supra* n.1; U.S. Dep’t of Lab. Wage and Hour Div., *Paid Sick Leave* (Sept. 2016), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/HowDoIknow.pdf>; The White House, Off. of the Press Sec’y, *FACT SHEET: Fair Pay and Safe Workplaces Executive Order* (July 31, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order> (stating that the “Department of Labor estimates that . . . businesses with federal contracts[] employ[] about 28 million workers”); Bureau of Lab. Stat., *Employment, Hours, and Earnings from the Current Employment Statistics Survey (National)* (extracted Jan. 7, 2021) (estimating 121,197,000 jobs).

²⁰ See *State Profiles*, USASpending.gov, <https://www.usaspending.gov/state> (calculated by filtering each state profile to FY2021 and adding “Count” of “Contracts” and “Amount” of “Contracts” respectively for all the undersigned States).

²¹ Ilan H. Meyer, *Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US*, UCLA Sch. of L. Williams Inst., 1 (Apr. 2019), <https://williamsinstitute.law.ucla.edu/publications/lgb-discrimination-experiences/>.

²² NPR et al., *Discrimination in America: Experiences and Views of LGBTQ Americans*, 29 (Nov. 2017), <https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

²³ Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, Ctr. for Am. Progress (May 2, 2017, 8:10 AM),

survey, about four-in-ten working women in the United States report having faced workplace discrimination because of their gender.²⁴

At the same time, a variety of employers have sought exemptions from generally applicable laws on the basis of their religious beliefs. *See, e.g., Burwell*, 573 U.S. at 769-70 (Ginsburg, J., dissenting) (collecting cases). Moreover, religious groups are increasingly adopting commercial identities.²⁵ For example, Catholic hospitals account for 14.5% of the United States healthcare market and receive government funds.²⁶ Further blurring the boundaries, as a result of industry consolidation, a growing number of healthcare organizations—secular and religious, public and private, for-profit and nonprofit—are entering contractual commitments to abide by religious identities that apply long after any actual attachment to a church or association of religious people has ceased.²⁷ For-profit enterprises directly owned by faith-based groups also generate billions of dollars in annual revenues in industries as diverse as newspaper, radio, television, publishing and distribution, digital media, hospitality, insurance, and agriculture.²⁸

By expanding the religious organization exemption, and lessening OFCCP’s oversight with respect to businesses and other entities claiming such an exemption, discrimination based on race, ethnicity, gender, sex, gender-identity, religion, and other protected categories is likely to increase over time, and harm the health and well-being of workers within our jurisdictions.²⁹ For example, after the Supreme Court recognized a constitutional “ministerial” exception to employment discrimination laws in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012), several Catholic dioceses have since designated all of their teachers as “ministers,” thus jeopardizing such teachers’ ability to challenge adverse employment decisions as violating antidiscrimination law.³⁰

<https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

²⁴ Pew Rsch. Ctr., *Gender Discrimination Comes in Many Forms for Today’s Working Women* (Dec. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>.

²⁵ Elizabeth Sepper, *Zombie Religious Institutions*, 112 Nw. L. Rev. 929, 987 (2018).

²⁶ *Id.* at 934-36.

²⁷ *Id.* at 940-41.

²⁸ Alan J. Meese et al., *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations are RFRA Persons*, 127 Harv. L. Rev. F. 273, 277-79 (collecting examples of for-profit corporations, publicly and closely held, asserting religious identities).

²⁹ *See, e.g.,* Deborah A. Widiss, *Intimate Liberties & Antidiscrimination Law*, 97 B.U. L. Rev. 2083, 2109 (2017) (“[R]ecent Supreme Court decisions expanding the scope of entities that may bring [Religious Freedom Restoration Act “RFRA”] claims and the scope of the ‘ministerial’ exception dramatically increase the likelihood that religious organizations and for-profit businesses will seek exemptions from otherwise applicable non-discrimination laws.”); *Hobby Lobby*, 573 U.S. at 770-71 (Ginsburg, J., dissenting) (warning of increased risks of discrimination because of the Court’s broad interpretation of RFRA).

³⁰ *See* Widiss, *supra* n.29, at 2105.

Moreover, employers often cite their religious objections when attempting to justify discriminatory practices. For example, according to a 2013 Pew Research Center survey:

The religious basis for opposition to homosexuality is seen clearly in the reasons people give for saying it should be discouraged by society. By far the most frequently cited factors—mentioned by roughly half (52%) of those who say homosexuality should be discouraged—are moral objections to homosexuality, that it conflicts with religious beliefs, or that it goes against the Bible. No more than about one-in-ten cite any other reasons as to why homosexuality should be discouraged by society.³¹

Discrimination against women in employment also occurs under the pretext of religious beliefs. Women have been fired or demoted for their decisions to access reproductive health care, such as contraception, abortion, and in-vitro fertilization, and for their decisions about whether and how to start a family, including becoming pregnant outside of marriage or becoming pregnant while in an LGBTQ relationship.³²

An increase in discrimination because of the 2020 Rule will likely force job change and lead to worker displacement and new instances of unemployment for individuals who face discrimination.³³ If the 2020 Rule is not repealed, worker displacement will reduce opportunities for on-the-job learning and advancement, lead to the abandonment of well-paying careers, and reduce the lifetime earnings of our States' residents.³⁴ Moreover, an increase in employment discrimination caused by the 2020 Rule will result in negative mental and physical health outcomes for our States' residents. Workers who are discriminated against and face job

³¹ Pew Rsch. Ctr., *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as “Inevitable”* (June 6, 2013), <https://www.pewresearch.org/politics/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable/>.

³² See, e.g., *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1170 (N.D. Ind. 2014) (school “declined to renew . . . teaching contract after learning [teacher] was undergoing in vitro fertilization in an effort to become pregnant”); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y. 1998) (an unmarried teacher at a religious school was fired because, as the school explained, her pregnancy was “clear evidence that she had engaged in coitus while unmarried”); *Ducharme v. Crescent City Déjà vu, L.L.C.*, 406 F.Supp.3d 548, 551 (E.D. La. 2019) (woman fired at her job for having an abortion); see also Dana Liebelson & Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, Mother Jones (Feb. 10, 2014), <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/>.

³³ See, e.g., Elizabeth Wrigley-Field & Nathan Seltzer, *Unequally Insecure: Rising Black/White Disparities in Job Displacement, 1981-2017*, Washington Ctr. for Equitable Growth (Feb. 2020) (finding that “Black workers were nearly always more likely to be displaced than whites, but that the Black/white disparity has grown over time with excess Black displacement doubling for women and tripling for men since the 1990s”); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. Socio. 181, 187 (2008).

³⁴ See, e.g., Marta Lachowska, et al., *Sources of Displaced Workers’ Long-Term Earnings Losses 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24127, 2019), https://www.nber.org/system/files/working_papers/w24217/w24217.pdf; Elyse Shaw, et al., *Sexual Harassment and Assault at Work: Understanding the Costs 4–5* (Inst. for Women’s Pol’y Rsch., Briefing Paper No. B376, 2018), <https://iwpr.org/publications/sexual-harassment-work-cost/>.

uncertainty or unemployment are more likely to experience depression, anxiety, and other mental health disorders, and are also at higher long-term risk for physical health problems.³⁵

B. The 2020 Rule poses harm to employers within our States.

The 2020 Rule adversely affects businesses in our States' jurisdictions. As the Department rightly notes in its proposal to rescind the 2020 Rule, instead of simplifying the legal landscape, the 2020 Rule sows confusion among federal contractors about their legal obligations.³⁶

As discussed above and below, the legal standards for the religious exemption under the 2020 Rule conflict with Title VII and state and local laws. Accordingly, as a practical matter, the 2020 Rule subjects federal contractors to different sets of competing legal requirements. If these divergent standards persist, they will likely result in confusion, misunderstanding, and litigation.

Moreover, the 2020 Rule's likely effect of increased employment discrimination over time will have negative effects on businesses overall, including in lost revenue, recruitment, retention, and employee productivity.³⁷ For example, recent research on the cost of employee turnover shows that such turnover costs an average of nearly 40 percent of the position's annual wage.³⁸

C. The 2020 Rule poses harm to our States' economic interests.

The 2020 Rule harms our States' economic interests by posing a threat to tax revenue in our jurisdictions and will likely lead to an increase in costs to our States' health care and public benefit programs.

³⁵ See, e.g., Stephanie Pappas, *The Toll of Job Loss*, 51 Monitor on Psych. 54 (2020), <https://www.apa.org/monitor/2020/10/toll-job-loss>; Jagdish Khubchandani, et al., *Workplace Harassment and Morbidity Among US Adults: Results from the National Health Interview Survey*, 40 J. Cmty. Health 555, 557-58 (2015); Kimberly Schneider, et al., *Job-Related Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. Applied Psych. 401, 412 (1997); Brad Sears, et al., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, Williams Inst. (July 2011) <https://williamsinstitute.law.ucla.edu/publications/employ-discrim-effect-lgbt-people/>.

³⁶ See 86 Fed. Reg. at 62,117.

³⁷ Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, Ctr. for Am. Progress, 2 (March 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf; *The Economic Consequences of Discrimination Based on Sexual Orientation & Gender Identity*, The U.S. Congress Joint Economic Comm. Democratic Staff (November 2013), https://www.jec.senate.gov/public/_cache/files/82ab1377-99ee-41bc-a99a-fced35ca578c/enda---final-11.5.13.pdf.

³⁸ Kate Bahn & Carmen Sanchez Cumming, *Improving U.S. Labor Standards and the Quality of Jobs to Reduce the Costs of Employee Turnover to U.S. Companies*, Washington Ctr. for Equitable Growth (Dec. 21, 2020); see also Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, Ctr. for Am. Progress (Nov. 16, 2012, 3:44 AM), <https://www.americanprogress.org/issues/economy/reports/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/> (describing over 30 studies that show that it costs businesses about one-fifth of a worker's salary to replace that worker).

First, the 2020 Rule has the potential to lead to a loss of tax revenue for our States. For example, many of our States impose and collect taxes based on income.³⁹ Employment discrimination leads to a loss of state tax revenue from income. For instance, studies in 2011 and 2013 found that Massachusetts and New York, respectively, lost millions of dollars in income tax revenues due to employment discrimination against transgender workers.⁴⁰ Because the 2020 Rule will likely cause an increase in employment discrimination, job change, worker displacement, and new instances of unemployment over time, the 2020 Rule will cause our States to lose tax revenue.

Second, it is likely that any increase in employment discrimination caused by the 2020 Rule will increase health care and public benefit program costs in our jurisdictions. Specifically, many residents in our States obtain their health insurance through Medicaid, the Children's Health Insurance Program, or other sources partially funded by the States. States pay health care costs for eligible low-income and moderate-income residents through a number of programs funded in whole or part by States. To the extent that the 2020 Rule causes an increase in worker displacement and new instances of unemployment, the number of individuals and families that rely on these programs will increase, and our States will need to expend more money to cover these costs.

Additionally, because of the 2020 Rule, the health care costs that state and local governments will bear will increase overall. The 2020 Rule's effects of increased employment discrimination will result in poorer health outcomes for workers and their families. And because individuals without health insurance wait longer to seek care, the care they eventually receive is more expensive.

Moreover, with new instances of unemployment because of the 2020 Rule, many individuals and their families may be compelled to seek out other services or programs to supplement or substitute their income, like Temporary Assistance for Needy Families ("TANF"), state and local county funded Safety Net Assistance ("SNA") and General Assistance, and the Supplemental Nutrition Assistance Program ("SNAP"), which will increase our States' costs associated with such programs. Any increase in demands for these programs will further strain our States' resources in light of the COVID-19 pandemic. For example, in Massachusetts, total weekly applications for SNAP, the Transitional Aid to Families with Dependent Children program, and the Emergency Aid to the Elderly, Disabled and Children more than tripled over the month of March 2020 to nearly 22,000 applications per week.⁴¹ As of October 2021, the

³⁹ See D.C. Code § 47-1801 *et seq.*; 35 ILCS 5/1 *et seq.*; Mass. Gen. Laws ch. 62; Mich. Comp. Laws § 206.1 *et seq.*; Minn. Stat. ch. 290; N.J. Stat. Ann. § 54A:1-1 *et seq.*; N.M. Stat. § 7-2-3; N.Y. Tax Law § 612(a); Vt. Stat. Ann. tit. 32, §§ 5822-5823.

⁴⁰ See Jody L. Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents in Massachusetts*, Williams Inst., 1 (April 2011), <https://escholarship.org/uc/item/76r1z02g>; Jody L. Herman, *The Cost of Employment and Housing Discrimination against Transgender Residents in New York*, 1 (April 2013), <https://escholarship.org/uc/item/7j08z94p>.

⁴¹ Chris Linsinski, *Mass. Residents Turning to Public Assistance Programs*, State House News Service (April 8, 2020, 3:48 PM), <https://www.statehousenews.com/email/a/2020723?key=flceac>.

total caseload for these programs in Massachusetts remains significantly higher than pre-pandemic rates at 638,261,⁴² as compared to 505,783 in January 2020.⁴³

D. The 2020 Rule conflicts with our States’ anti-discrimination laws and poses burdens on our States’ efforts to prevent discrimination in employment.

Our States have enacted laws and policies that balance the protection of workers within our jurisdictions from discrimination on the basis of various protected classes with employers’ religious beliefs.⁴⁴

The 2020 Rule is at odds with the carefully crafted balances struck in our States’ statutes and regulations and harms our States’ interests in enforcing our own laws and furthering longstanding anti-discrimination policies. Because the 2020 Rule provides a variety of employers with a potential perceived license or defense to discriminate against various groups of individuals, it may require our States to bear greater enforcement and administrative costs to protect workers from discrimination in our jurisdictions, and to enforce state and local nondiscrimination mandates in the long term.

Our States have agencies charged with enforcing anti-discrimination laws and furthering the longstanding public policy of anti-discrimination in employment. For many of these agencies, employment is the area under which many or most discrimination and harassment cases are filed.⁴⁵

⁴² Mass. Dep’t of Transitional Assistance, DTA Monthly Zip Code Catchment Report (Nov. 2, 2021), <https://www.mass.gov/lists/departments-of-transitional-assistance-facts-and-figures#2021-facts-and-figures->.

⁴³ Mass. Dep’t of Transitional Assistance, DTA facts and figures – February 2020 (Feb. 2, 2020), <https://www.mass.gov/lists/departments-of-transitional-assistance-facts-and-figures#2020-facts-and-figures->.

⁴⁴ See Cal. Gov’t Code §§ 12926, 12940, 12990; Colo. Rev. Stat. § 24-34-402; Conn. Gen. Stat. §§ 46a-60, 46a-81p; D.C. Code §§ 2-1401 *et seq.*; 775 ILCS 5/1, 775 ILCS 5/2-101; Mass. Gen. Laws ch. 151B, § 4; Mich. Comp. Laws §§ 37.2202, 37.1202, 37.2208; Minn. Stat. §§ 363A; Nev. Rev. Stat. §§ 613.330, 613.320, 613.350; N.J. Stat. Ann. § 10:5-12; N.M. Stat. § 28-1-7(A); N.Y. Exec. L. § 296; N.C. Gen. Stat. § 143-422.2; 43 Pa. Stat. §§ 953, 954, 955; 16 Pa. Code §§ 49.1, 49.2, 49.101; Vt. Stat. Ann. tit. 21, § 495.

⁴⁵ For example, in California, 22,584 complaints were filed with the California Department of Fair Employment and Housing (“CADFEH”) in 2019. Of those, 20,430, or 90% were employment discrimination complaints. In D.C., of 512 docketed cases in 2018, 393 were employment-related. In Illinois, in Fiscal Year 2020, out of 2,933 charges filed with the Illinois Department of Human Rights (“IDHR”), 2,482 were employment charges, with an average cost of \$4,360.99 per case. In Massachusetts, during Fiscal Year 2020 the Massachusetts Civil Rights Division received 1,851 complaints of discrimination, 412 of which were related to employment-based discrimination. In Fiscal Year 2020, the Massachusetts Commission Against Discrimination (“MCAD”) received 2,277 complaints of discrimination, of which 2,223 were related to employment-based discrimination. In Michigan, 779 and 438 complaints alleging discrimination in employment were filed in 2020 and 2021 respectively. In Minnesota, 595 charges of discrimination were filed with the Minnesota Department of Human Rights (“MDHR”) in Fiscal Year 2019, 411 of which were employment charges. In New Jersey, in 2018, 310 of 423 filed discrimination complaints were employment discrimination complaints. In 2019, 371 of 521 discrimination complaints were employment discrimination complaints. In New York, approximately 83% of the cases filed during the 2020 and 2021 fiscal years were employment discrimination cases. In Pennsylvania, in 2018-2019, of 1,182 cases filed, 925 cases were related to employment discrimination.

The 2020 Rule will likely cause an increase in complaints of employment discrimination to many of our States' agencies in the long term, which will in turn cause an increase in staffing needs and staff time spent on various stages of the complaint and resolution process, including agency investigation, administrative hearings, mediation, case resolution, and appeals. Additionally, if the 2020 Rule is not rescinded, our States anticipate the need to develop processes for escalating, analyzing, and resolving claims of discrimination in the event that a complaint presents an issue of whether and how an employer claims a religious exemption under the 2020 Rule as a justification to a claim of discrimination.

The 2020 Rule also has the potential to cause confusion for employers with respect to their obligations under federal and state law. Many of our States anticipate that if the 2020 Rule were to remain in effect, they would likely need to expend resources to clarify for employers, workers, and other stakeholders the differences between state and local laws and regulations and the 2020 Rule.

VI. Conclusion

We greatly appreciate the opportunity to comment on the Department's proposal, and we support rescission of the unlawful and harmful 2020 Rule in its entirety.

Sincerely,



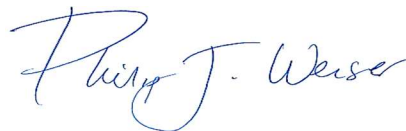
LETITIA JAMES
New York Attorney General



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Pennsylvania Attorney General



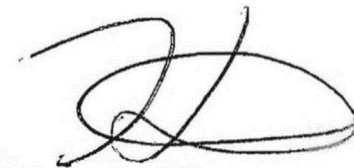
ROB BONTA
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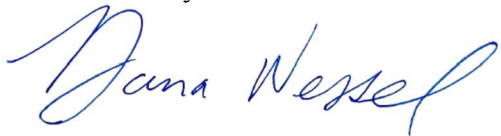
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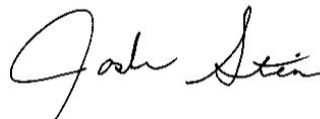
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